TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~405.~~ 232 52

THE COUNTY OF BATH, AND THE COUNTY COURT THEREOF, JOHN D. YOUNG, PRESIDING JUDGE OF SAID COURT, J. G. HURST, G. W. SORRELL, JOHN DICKIN, ELIAS BLAINS, C. H. CARTWELL, NOBLE WRIGHT, J. H. HENRY, CALEB BAIRD, C. P. VAN PELT, WILLIAM SHIELDS, J. C. SEJORS, S. N. PERRY, JEFFERSON VILL, AND DANIEL PIERATT, JUSTICES OF THE PEACE, PLAINTIFFS IN ERROR,

vs.

HENRY AMY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED JULY 15, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 465.

THE COUNTY OF BATH, AND THE COUNTY COURT THEREOF, JOHN D. YOUNG, PRESIDING JUDGE OF SAID COURT, J. G. HURST, G. W. SORRELL, JOHN DICKIN, ELIAS BLAINS, C. H. CARTWELL, NOBLE WRIGHT, J. H. HENRY, CALEB BAIRD, C. P. VAN PELT, WILLIAM SHIELDS, J. C. SEJORS, S. N. PERRY, JEFFERSON VILL, AND DANIEL PIERATT, JUSTICES OF THE PEACE, PLAINTIFFS IN ERROR,

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a UNITED STATES OF AMERICA,
District of Kentucky, ss:

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, greeting, (at Covington:)

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between Henry Amy, plaintiff, and The County of Bath, and The County Court thereof, John D. Young, presiding judge of said court, J. G. Hurst, G. W. Sorrell, John Dickin, Elias Blains, C. H. Cartwell, Noble Wright, J. H. Henry, Caleb Baird, C. P. Van Pelt, William Shields, J. C. Sejors, S. N. Perry, Jefferson Vill, and Daniel Pieratt, justices of the peace, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington on the first day of our next December term, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, esq., Chief Justice of the Supreme Court of the United States, and the seal of said court, at Louisville, in said district, this 18th day of March, A. D. 1870, and of the independence of the United States the 94th.

A. J. BALLARD,
C. C. C. K. D.

b UNITED STATES OF AMERICA,
District of Kentucky, ss:

To Henry Amy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the fifth day of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, at Covington, wherein Bath County, &c., are plaintiffs, and you are defendant in error, to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 18th day of March, in the year of our Lord 1870, and of our independence the 94th.

[SEAL.] BLAND BALLARD.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term, begun and held at the federal court-hall, in the city of Covington, on Monday, December , A. D. 1866.

Present, Hon. Bland Ballard, judge.

Order.

HENRY AMY
vs.
BATH COUNTY, KY.

Be it remembered that heretofore, to wit, on the 4th day of December, A. D. 1866, came the plaintiff by his attorney, H. Myers, esq., and filed his affidavit herein, and a notice and return thereon, and moved the court for the writ of mandamus to issue to The Bath County Court, commanding said court forthwith to levy and cause to be collected a tax upon the taxable property in said county sufficient to pay off and discharge the unpaid coupons and the interest which has accrued thereon, which are mentioned in the aforesaid affidavit.

2 The following is the notice & return referred to in the foregoing order, viz:

Notice.

The County of Bath, in the State of Kentucky, and The County Court of said county, and Jno. D. Young, presiding judge of said county court, and J. G. Hurst, G. W Sorrell, John Dickin, Elias Blevins, C. H. Cartwell, Noble Wright, J. H. Henry, Caleb Baird, C. P. Van Pelt, W'm Shields, Jno. C. Lyons, S. N. Perry, Jefferson Vill, and Daniel Pieratt, the several justices of the peace in and for said county, who with said judges compose said county court, and who are citizens of the State of Kentucky, are hereby notified that the undersigned, Henry Amey, a citizen of the State of New York, is the holder of 82 of the bonds, and the unpaid interest warrants annexed, issued by said county to the Lexington & Big Sandy Railroad Company in payment of the subscription of $150,000 to the capital stock of said company, as authorized by an act of the general assembly of Kentucky, approved January 9th, 1852, entitled "An act to incorporate the Lexington & Big Sandy Railroad Company," and an act amendatory thereof, approved March 1st, 1854, entitled "An act to amend the charter of the Lexington & Big
3 Sandy Railroad Company," which bonds are numbered, 3, 7, 9, 10, 11, 12, 15, 16, 17, 21 to 23 (Inclusive.), 27 to 29 (Inclusive.), 30 to 35 inclusive, 39 to 43, 45, 46, 49, 50, 59, 60 to 68, 75 to 79, 80 to 89, 90 to 98, 100 to 102, 105, 113, 116, 118 to 120, 127, 130 to 132, 135 to 137, & 140; and that the interest warrants annexed to said bonds, which matured on the 15th day of Oct., 1858, and all interest warrants maturing since said date, remain unpaid by reason of the neglect and refusal of said county court to levy and cause to be collected the necessary tax to pay said coupons, as it was, and is made, the duty of said county court to do by the aforesaid acts of the general assembly of Kentucky.

Wherefore the undersigned, Henry Amy, hereby demands of the said county court, and of the presiding judge thereof, and of the several justices of the peace aforesaid, that they forthwith levy upon the taxable property of said county a tax sufficient to pay off and discharge the unpaid interest warrants aforesaid, and that they cause the same to be collected; and in default thereof the said county court, and the presiding judge and justices composing the same, are hereby notified that on the 2nd day of the next December term of the United
4 States circuit court for the district of Kentucky, to be holden at

Covington, Kentucky, the undersigned will move said court for the peremptory writ of mandamus to issue to the said county court, judge, and justices, requiring them to levy and cause to be collected the tax aforesaid, as by law it is made the duty of said court to do.

HENRY AMY,
By STEVENSON AND MYERS,
His Counsel and Attorneys.

Upon which is the following return:

Return.

Executed by delivering a copy to each of the within-named parties, Jno. D. Young, 2 copies, J. G. Hewit, G. W. Sorrell, W'm Shields, Daniel Pieratt, John Dickens, Nov'r 13th; J. C. Lyons, S. N. Perry, Elias Blevin, Nov'r 15th; Caleb Baird, C. P. Van Pelt, W'm Vance, C. H. Cartwell, Noble Wright, J. H. Henry, who constitute the county court of Bath County, and justices of the peace.

J. C. WHARTON,
D'p'y U. S. M.

Marshal's fees, 16 notices, @ $2 00 each, 32 00.

The following is the affidavit:

Affidavit.

United States circuit court for the district of Kentucky, at Covington.

5 HENRY AMY, PLAINTFF,
against
THE COUNTY COURT OF BATH COUNTY, KENTUCKY, and others, def'ts. } Affidavit.

The undersigned, Henry Amy, states that he is a citizen of the State of New York, and that the County Court of Bath County, and the presiding judge and justices of the peace hereinafter named are citizens of the State of Kentucky.

He further states that, under and by virtue of an act of the general assembly of the Commonwealth of Kentucky, approved January 9th, 1852, entitled "An act to incorporate the Lexington & Big Sandy Railroad Company," and of an act amendatory thereof, approved March 1, 1854, entitled "An act to amend the charter of the Lexington and Big Sandy Railroad Company," the County of Bath, in the State of Kentucky, was, by its county court, which was and is the official agent of said county, authorized to subscribe $150,000 to the capital stock of the Lexington and Big Sandy Railroad Company, a corporation created by s'd acts, and to borrow money for the purpose of paying s'd
6 subscription, and to issue the bonds of s'd county as a surety for such loan, or in payment of s'd subscription; and it was further made the duty of s'd county court, by the terms of s'd acts, to levy and cause to be collected annually a tax upon the real and personal property in said county sufficient to pay the interest of any bonds that should be issued as a surety for said loan, or in payment of s'd subscription. The said two acts of the general assembly are prayed to be considered as part hereof.

And the s'd pl't'ff says that the county court of said county did, on the day of , 1852, subscribe said $150,000 to the capital stock of

said company; for payment thereof made 150 bonds of $1,000 each, sealed with the corporate seal of said county, each signed by Ch's Glower, then presiding judge of said county court, and attested by R. H. Conner, then county clerk of said county, in their official capacity, and by the terms of each of the said bonds said county acknowledged itself indebted to the said Lexington and Big Sandy Railroad Co. in the sum of $1,000, which it undertook to pay to the said com-
7 pany or order, thirty years after date of said bonds, (the said bonds being dated the 15th of April, 1853,) together with six per centum interest, payable semi-annually, the principal and interest being payable at the Bank of America, in the city and State of New York, and for each installment of interest to mature on each of said bonds a coupon or interest warrant for $30 was annexed to the bond.

And the plaintiff says that s'd bonds and coupons were at the date last aforesaid delivered to said railroad company, and were accepted and received by it in full payment and discharge of said subscription of $150,000 to its capital stock; and thereupon, to wit, on the day of , 1853, the said railroad company sold the said bonds in market , in the stock market of the city and State of New York, and by its indorsements upon said bonds so indorsed to the purchasers.

And plaintiff says that he has become and is the holder, owner, and bearer of 82 of said bonds, to wit, those numbered 3, 7, 9, 10, 11, 12, 15, 16, 17, 21, 22, 23, (27, '8, '9,) (30, '1, '2, '3, '4, '5, '9,) (40, '1, '2,' 3, '5, '6, '9,) (50, 51,) (60, '1, '2, '3, '4, '5, '6, '7, '8,) (75, '6, '7, '8, '9,) (80, '1, '2,
8 '3, '4, '5, '6, '7, '8, '9,) (90, '1, '2, '3, '4, '5, '6, '7, '8,) 100, (102, '3, '4, '5,) 113, 116, 118, 119, 120, 127, (130, '1, '2, '5, '6, '7,) and 140, and of the unpaid coupons thereto annexed.

And plaintiff says that the county court of Bath County, did levy, and cause to collected, and placed at the Bank of America, in the city of New York, sufficient taxes upon the taxable property in said county, to pay the several installments of interest maturing on said bonds prior to the 15th of October, 1858, and the interest warrants maturing prior to that date were paid and surrendered to the proper agents of said county.

And he says that said county court did levy, and cause to be collected, sufficient taxes in the years 1858, 1859, and 1860, to pay the interest accruing upon said bonds, but the persons composing said court caused orders to be entered upon the records thereof, forbidding the sheriff to transmit any portion of said money to the Bank of America aforesaid, and forbidding him to allow any of said fund to be expended in paying the interest on s'd bonds, and the interest maturing on the 15th
9 of Oct'r, 1858, and all installments since accruing remain unpaid and unprovided for, and no tax has been levied on the property in said county to pay the interest which accrued on said bonds in the years 1861, 1862, 1863, 1864, 1865, or 1866, nor has any provision whatever been made for the payment of said interest warrants.

The plaintiff says that the county court of Bath County is at this time composed of John C. Young, presiding judge, and J. G. Hurst, G. W. Sorrell, John Dickin, Elias Blevins, C. H. Cartwell, Noble Wright, J. H. Henry, Caleb Baird, C. P. Van Pelt, W'm Shields, John C. Lyons, J. N. Perry, Jefferson Vice, and David Pieratt, justices of the peace in commission in said county; that there is in said county about $4,000,000 of real and personal estate liable and subject to said tax, and that it is the duty of said county court, under and by virtue of the several acts aforesaid, to levy and cause to be collected a sufficient tax upon said property to pay off the interest warrants aforesaid.

Plaintiff says that he did, on and about the 12th of November, 1866, make a written demand upon said county court and upon the pre-
10 siding judge, and the *and the* several justices of the peace composing the same, that they forthwith levy upon the taxable property in said county a tax sufficient to pay off and discharge the interest warrants aforesaid, and that they cause the same to be collected, but the said county court judge and justices have wholly failed and refused to make said levy or collection.

Plaintiff files herewith one of said bonds, to wit, No. 11, together with the unpaid coupons annexed thereto, and prays that it be considered as part hereof. He says that the remaining 81 of the said bonds, and the coupons annexed, are in the same words and figures as the one filed.

He says that the said coupons or interest warrants mature semi-annually, and that he is entitled to have interest on them from the respective dates when they became due.

Wherefore he prays that the peremptory writ of mandamus do issue from this court to the county court of Bath County, and to the county judge, and the several justices of the peace in said county, commanding them forthwith to levy and cause to be collected a tax upon the
11 real and personal property in said county sufficient to pay off and discharge plaintiff's said coupons, and the interest which has accrued thereon since their maturity, and the cost of this proceeding, and that they do, from year to year, levy and cause to be collected sufficient taxes in said county to pay off the several installments of interest yet to become due before the maturity of said bonds.

And, as in duty bound, he will ever pray.

HENRY AMY.

Certificate of cl'k.

United States circuit court for the southern district of New York, at the city of New York, ss:

Personally appeared before the undersigned, clerk of said court, Henry Amy, a citizen of New York, and made oath that the facts stated in the foregoing affidavit are true.

Dated November 27th, 1866.

KENNETH G. WHITE,
Clerk Circuit Court of the U. S., S. Dist of New York.

Afterwards, to wit, December 7th, 1866, the following order was made, viz:

Order.

"This day came the plaintiff, by his attorney, H. Myers, esq.,
12 and on his motion a rule is awarded against the defendants, requiring them to shew cause why a writ of mandamus shall not issue against them, returnable to-morrow morning."

And afterwards, on the same day, to wit, Dec'r 7, 1866, the following order was made, viz:

Order.

"This day came the defendants, by their attorney, John G. Carlisle, esq., and filed a written motion and pleas herein."

The following is the written motion referred to in the foregoing order, viz:

Motion.

United circuit court, Kentucky district.

And now came the said defendants, by their attorneys, &c., and craved oyer of all the said alleged bonds and coupons, and also craved oyer of the said two acts of the general assembly of Kentucky, approved Jan'y 9th, 1852, and March 1, 1854, and the same being now read to them in the words and figures following, to wit:

Bond.

"1,000. No. 3. Certificate A.

"United States of America, State of Kentucky, county of Bath.—Lexington and Big Sandy Railroad Company.

"The County of Bath acknowledges itself indebted to the Lex-
13 ington and Big Sandy Railroad Company, or order, in the sum of one thousand dollars, negotiable and payable at the Bank of America, in the city of New York, thirty years from the date hereof, upon the presentation and delivery of this certificate, bearing an interest of six per centum per annum from date, payable semi-annually at said bank, upon the presentation and delivery of the proper coupon thereto attached, signed by the county clerk of said county.

"This certificate is issued in part payment of the subscription of one hundred & fifty thousand dollars by Bath County to the capital stock of said Lexington and Big Sandy Railroad Company, by order of the county court of said county, as authorized by a vote of the people of said county, taken in pursuance of an act of the general assembly of the Commonwealth of Kentucky, incorporating said railroad company, approved the ninth day of January, 1852.

"Witness the seal of the county court of Bath County, and the signature of the presiding judge of the said court, and the counter-signature of the clerk thereof, this 15th day of April, one thousand eight hundred and fifty-three.

[SEAL.] "CH. GLOVER,
"*Presiding Judge Bath Co. Court.*

"R. A. CONNER, *Clerk Bath County Court.*"

14 The following is one of the coupons:

Coupon.

"$1,000. Certificate A, No. 3.

"Lexington and Big Sandy railroad subscription, County of Bath, Kentucky, interest warrant No. 25, payable at the Bank of America, New York, on the 13th day of October, 1865.

"$30.

"R. H. CONNER,
"*Clerk of C. Court of Bath Co.*"

The following is the endorsement on bond:

Endorsement.

"For value received the within bond is hereby assigned to or bearer, and the prompt payment of the principal and interest of said bond is guaranteed by the Lexington and Big Sandy Railroad Company.

"R. APPERSON, *President.*

"GEO. J. STOCKTON, *Sec'y.*"

The said defendants move the court to discharge the motion and rule for a writ of mandamus herein.

BECK,
TURNER,
BRISTOW,
HUNT,
CARLISLE, and
O'HARA, *Att'ys.*

The following is the plea referred to in the foregoing order, viz:

Plea.

United States circuit court, Kentucky district.

15 1st. And now come the defendants by their attorneys, &c., and say that this court has no jurisdiction to hear and determine the matters and things alleged in the affidavit of the plaintiff, nor any power or authority to award a writ of mandamus against them, because they say that it has not at any time heretofore been ascertained or determined, by the judgment of this court or of any other court, that the said defendants, or either of them, are indebted to the said plaintiff in the said sums of money mentioned in the said affidavit, or in either of said sums, or any part thereof; nor has it at any time heretofore been ascertained or determined, by this court or any other court, that the said defendants, or the County Court of Bath County, were legally bound to levy said tax, or any part thereof.

2. And for a further response and plea herein, the said defendants say that they are the members who constitute the Bath County Court, and that as such court they have full power and authority to determine, in their judicial capacity, whether or not the said tax shall be levied and amended, and at what times and in what amounts the same

16 shall be levied and amended; and they aver that this court has no power or jurisdiction to direct or control the action of the said court in the premises, by compelling them, against their will and judgment, to levy and collect said tax, or any part thereof; and they say that the writ herein demanded is not in any way necessary for the exercise of the jurisdiction of this court, nor is it agreeable to the principals and usages of law.

3. And the said defendants come and crave oyer of all the bonds and coupons mentioned in the said affidavit, and also crave oyer of the said acts of the general assembly, approved Jan'y 9th, 1852, and March 1, 1854.

And the same being now read to them in the words and figures following, to wit:

"HENRY AMEY
"*ag'st* } Agreement.
"BATH COUNTY.

"It is agreed by the parties hereto that The Lexington and Big Sandy Railroad Company was a corporation created by an act of the
17 general assembly of Kentucky, approved January 9th, 1852, with power to raise $1,000,000, or more, capital, and to construct a railroad from the city of Lexington, Kentucky, to the mouth of the Big Sandy River, in Kentucky; that it was granted by said charter the usual powers of such corporations, including the power to contract, sue, and be sued; that the 24 section of the original article contained this clause:

"'If the exigencies of the company should require the payment on the stock to be made more rapidly than is provided for herein, or should the president and directors, or a majority of the whole number elected, consider it expedient for the purpose of aiding the stockholders or hastening the completion of the contemplated road, it shall be lawful for them to borrow, on the credit of said company, a sum of money not exceeding five thousand dollars, and shall have power to pledge the property of the company for the payment thereof.'

"And that the 28th section is in the words and figures following, to wit:

"'That the city of Lexington and the counties of Clarke, Montgomery, Bath, Fleming, Carter, Greenup, and Fayette, and any other city, county, or corporation, be, and they are hereby, permitted to hold stock in the corporation created by this act upon the same terms, on
18 the same conditions, and subject to the same restrictions with other stockholders: *Provided*, The amount by said several cities, counties, and corporations seperately subscribed shall not in any single instance exceed the following sums: By Lexington, one hundred and fifty thousand dollars; by Lexington and Fayette County, jointly, one hundred and fifty thousand dollars; by Clarke County, two hundred thousand dollars; by Montgomery County, two hundred thousand dollars; by Bath County, one hundred and fifty thousand dollars; by Fleming County, one hundred and fifty thousand dollars; by Carter County, one hundred thousand dollars; by Greenup, one hundred and fifty thousand dollars; and by any other city, county, or corporation, any sum not exceeding the largest amount aforementioned. And it shall be lawful for the president and directors of said company, after giving six weeks' notice thereof by advertisement in the papers of the said several cities and counties wherein a vote shall be proposed, (or if there be no paper printed in any county which a vote shall be proposed, then in such paper as may have general circulation in such county,) upon a day named in such advertisement, to take the
19 sense of the qualified voters of said cities and counties, or any one or more of them, as to the policy of said cities and counties, or any one or more of them, becoming subscribers to the stock in said railroad company to any amount which may have been proposed in said printed notice, not exceeding the respective sums above specified. And it shall be the duty of the mayor and council of the city of Lexington and all other cities, and of the county courts of the several counties, upon the day named in said printed notice, to open *colums* in the various precincts of said cities and counties, and to take all necessary measures for correctly ascertaining the sense of the qualified voters of their re-

spective counties and cities, at the polls thereof, as aforesaid; and provided a majority of all the qualified voters of any of said cities or counties, who shall have cast their votes at said election, shall be in favor of the said several subscriptions of stock as proposed to such city or county, it shall be the duty of the mayor and council of every such city to pass an ordinance not exceeding the sum specified in said printed notice; and it shall be the duty of the county court of every such county in like manner to empower and direct their clerk to subscribe for the amount of stock authorized by the voters of said
20 county not exceeding the sum specified in said printed notice; and it shall be lawful for said cities and counties so authorizing subscriptions to the capital stock of said company to raise the amount of their seperate subscriptions as the same shall be called by the president and directors of said road, and by a tax on the real and personal estate of the said several cities and counties subscribing, or by borrowing the amount thereof, payable in the way and on the terms the said several mayors and councils and the said several county courts may deem most advisable; and the interest on all such sums borrowed may be provided for in such manner as to them seems best: *Provided*, That all taxes laid by any city or county to pay the principal and interest (or either) of the amounts borrowed by them shall be pledged and sacredly appropriated to such purpose, and no other: *And provided*, That all sums paid by any citizen of said cities or counties on account of the several subscriptions of any city or county, or in payment of the interest of any such subscription, shall entitle him to a certificate for the amount thereof, and, when said certificates amount to fifty dol-
21 lars, shall entitle him to one share of the stock subscribed by said city or county for every fifty dollars so held by him: *Provided further*, That the city council of the city of Lexington may, at any time after the passage of this act, on giving three weeks' notice thereof in the newspapers printed in said city, cause a poll to be opened in all the wards of said city, and the sense of the voters taken as to the propriety of said city subscribing to the capital stock of said road, as provided in this charter; and if a majority of those voting vote in favor of, it shall be the duty of the board of council to subscribe the number of shares provided for in this charter so soon as books shall be opened.'

"It is further agreed that sections 8 and 9 of the act of March 1st, 1854, amendatory of the original *character*, are in the words and figures, to wit:

"'SECTION 8. That the vote taken in the city of Lexington, on the day of , 1852, upon the proposition to subscribe one hundred and fifty thousand dollars of stock to The Lexington and Big Sandy Railroad Company, shall be, in all respects, held and taken to be as legal and binding; and the mayor and board of councilmen of
22 said city, upon the fulfillment of the conditions on which the vote was taken, shall subscribe stock to said railroad in all respects as if said vote had been taken in strict conformity to the act to which this is an amendment, and the poll-books showing a majority in favor of said subscription had been returned according to law. And that the subscriptions of stock to said railroad company by the county courts of Carter, Bath, Clarke, and Montgomery Counties be, and they are hereby, ratified and approved by this general assembly; and the county courts of said counties, and all the officers of said counties, are required and directed to issue bonds, and proceed to levy, assess, and collect the taxes to pay the interest on the same according to the true intent and

requirements of the laws authorizing the votes and subscriptions, notwithstanding any informality or irregularity which may have been in the proceedings hitherto.

"'SECTION 9. The vote of the qualified voters of any county may be taken again when such former vote has been in the negative, and such second vote shall, in all respects, be governed by the original act as qualified this amendment; and any town in the commonwealth may subscribe stock in this company under the same regulations and
23 restrictions as contained in said 28 section.'

"It is further agreed that the foregoing sections of said acts contain all that there is which is material or essential to the questions involved in this case, but that either party may, on the trial, use or submit to the court the volumes of the acts of the Kentucky legislature containing said acts, and printed by the authority of the general assembly of Kentucky.

"STEVENSON AND MYERS,
"*For H. Amey & Co.*"

They say that none of the said bonds or coupons are the act and deed of the said County *Court* of Bath or of the County Court thereof, and that the same was executed and delivered without the authority of said county or said court.

4. And for a further plea and response herein they say that the said alleged subscription of $150,000 to the capital stock of The Lexington and Big Sandy Railroad Company is not the act and deed of the said County of Bath or of the County Court thereof, and that the same was not made by the said county or court or by the authority of the same.

5. And for a further plea and response in this behalf, they say
24 that the said Lexington and Big Sandy Railroad Company, by its president and directors, have never at any time made a call for the amount of the said alleged subscription, or any part thereof, and that they are not bound to levy or collect the said tax, or any part thereof, without such call, as provided by the said act approved Jan'y 9th, 1852.

6. And for a further plea and response in this behalf, the said defendants say that seventeen of the said bonds mentioned in the affidavit of the plaintiff herein, to wit, the bonds numbered 102, 103, 104, 105, 113, 116, 118, 119, 120, 127, 130, 131, 132, 135, 136, 137, & 140, and the several coupons thereto attached, were, after the same were dated and signed by the judge of the Bath County Court, and countersigned by the clerk thereof, and after the same had been delivered to the president of The Lexington and Big Sandy Railroad Company, and received by said company in discharge of so much of the alleged subscription to the capital stock of said company, altered without the consent of
25 defendants in a material part thereof, to wit, the dates of said *of said* bonds were changed from the year 1855 to the year 1853, thereby making the said bonds mature *ten* years earlier; whereof the defendants say that the said bonds and coupons are not the acts and deeds of the said County of Bath or of the County Court thereof.

7. And for a further plea and response the said defendants say that the said plaintiff did not, nor did any one for him, at any time before the commencement of this proceeding, demand of the defendants, or of any of them, that they should levy and collect the said tax to pay the said several sums of money alleged to be due and owing to the plaintiff.

8. And for a further plea and they say that the said plaintiff did not pay any good or valuable consideration whatever for any of the said

bonds or coupons thereto attached, and that he is not the owner of the same or of any part thereof; and it is not true that said bonds and coupons, or any portion of the same, were sold in the market overt,
26 as alleged by the plaintiff, or that they were sold to the plaintiff at any time or place.

9. And for a further plea *so* they say that there is not now and never was any such corporation as The Lexington & Big Sandy Railroad Company; that the said act of the general assembly of Kentucky, approved Jan'y 9th, 1852, authorizing the formation of such a company, with the rights, privileges, and franchises of a corporation, expressly prohibited the organization thereof until such time as the sum of $100,000 should be subscribed to its capital stock; and they say that the said sum was not, in fact, subscribed at any time before the pretended organization of the said company, and the same was therefore illegal and unauthorized by law, and that the alleged endorsement of the said bonds by the said pretended corporation did not and could not confer any right or title upon the plaintiff.

10. And for a further plea *and* the said defendants say that the president and directors of the said Lexington and Big Sandy Railroad Company did not, before the making of the said alleged subscription of
27 $150,000, or before the issue of the said alleged bonds and coupons, or at any other time, give six weeks' notice, or any notice, by advertisement in the papers of said county of Bath, or any other papers, that upon a day named an election would be held at the various election precincts in said county to take the sense of the qualified voters thereof as to the propriety of making the said subscription; that no measures were ever taken to ascertain the sense of the qualified voters upon such question, nor was said question ever at any time or in any way presented to, or considered, or determined by the qualified voters of said county, as required by the said act approved Jan'y 9th, 1852; and they aver that the said plaintiffs is not now the owner and holder of said bonds and coupons for value and in good faith, and that the same were not, nor were any of them, sold in market, overt or otherwise. Wherefore they say that the said alleged subscription and the said alleged bonds and coupons were made and issued by the agents of said County of Bath without any power or authority whatever, and that the same are null and void.

28 11. And the said defendants, for a further plea, &c., say that as to all of the said alleged coupons which matured and became due and payable before the 15th day of November, in the year 1861, the plaintiff's cause of action thereon, if any he had, did not accrue to him within five years next before the commencement of these proceedings; and as to all the said alleged coupons the said defendants now plead and rely upon the statute of limitations, in such cases made and provided, as a bar to the said plaintiff's right to the writ of mandamus, or to any relief whatever.

Whereof they pray to be dismissed, &c.

BECK,
TURNER,
HUNT, &
CARLISLE & O'HARA, *Att'ys.*

Jno. D. Young says that he is the judge of the county court of Bath County, Ky., and that, for all the information he has been able to obtain, the statements of the foregoing pleas are true.

JNO. D. YOUNG.

Sworn to by John D. Young before me the 7th day of Dec'r, A. D. 1866.

J. M. BLACKBURN,
Deputy U. S. Clerk.

29 Afterwards, to wit, December 7th, A. D. 1866, the following order was made:

Order.

"By consent of both parties this cause is set for trial on Wednesday, January 9th, 1867, at our circuit court, at Frankfort, Ky."

Proceedings of the circuit court of the United States for the district of *the* Kentucky, held at Louisville, for its February term, A. D. 1867, to wit, on Saturday, April 13th, A. D. 1867.

Present, Judge Ballard.

HENRY AMEY
vs.
THE COUNTY COURT OF BATH COUNTY, KY.

The certiorari of the proceedings of our circuit court, at Frankfort, in the above case, having been filed here, it is ordered by the court, on its own motion, that the further hearing of this cause be had in our court, at Covington, and the clerk is ordered to transmit the original papers to the clerk of our court there.

DISTRICT OF KENTUCKY:

I, A. J. Ballard, clerk of the circuit court of the United States
30 for the district of Kentucky, do certify that the forgoing is a true and correct transcript of the proceedings of our court, at Louisville, had in the above case.

Witness my signature and the seal of said court, at Louisville, this 13th April, 1867.

A. J. BALLARD, *Clk.*

Afterwards, to wit, April 17th, A. D. 1867, the following order was made:

"This day came the plaintiff by H. Myers, esq., his att'y, and filed traverse; also, an agreement."

The following is the traverse:

Traverse.

United States circuit court, district of Kentucky.

HENRY AMEY
vs.
BATH COUNTY COURT, &C. } Traverse.

Came the pl't'ff, Henry Amey, by his counsel, Stevenson & Myers, & traverses and denies each and every allegation in the response of the defendant filed herein, which is inconsistant with the facts stated in the affidavit of the pl't'ff filed herein on the 4th day of Dec'r, 1866, & upon which s'd rule was granted.

31 The following is the agreement:

Agreement.

HENRY AMEY
vs.
BATH COUNTY COURT, &C. } Agreement.

The undersigned, counsel for the parties to the above-entitled cause, do hereby agree to submit the law and facts arising upon the issue made upon the response of the defendant to the rule herein to the court for trial and decision, and do hereby waive a trial by a jury.

STEVENSON AND MYERS, *for Amey.*
CARLISLE AND O'HARA, *for Def'ts.*

Afterwards, to wit, May 9th, A. D. 1867, the following order was made:

Order.

"This day came the plaintiff by his att'y, H. Myers, esq.; came also the defendants by their attorney, J. G. Carlisle, esq. The court now being sufficiently advised of and concerning the motion made by the defendants to dismiss the plaintiff's motion for a preemptory writ of mandamus, it seems to the court that the law is for plaintiff, and that said motion be overruled; to which ruleing of the court defendants except."

32 Afterwards, to wit, May 9th, A. D. 1867, the following order was made:

HENRY AMEY
against
BATH COUNTY COURT. } Mandamus.

Judgment.

The court rendered the following written judgment herein, to wit:

The trial of the issues of fact joined herein having been submitted to the court by the agreement of the parties, and by further agreement of the parties a traverse of the facts set forth in the response of the defendants having been entered at the present term of this court, and the court, having heard testimony and argument of counsel, doth now find said issues of fact for the plaintiff.

And it is now adjudged and ordered that the premtory writ of mandamus do issue from this court to The County Court of Bath County, and to the Presiding Judge and Justices of the Peace composing said court, commanding said court forthwith to make full and ample provision for the payment of the several coupons or interest warrants belonging to the plaintiff, and described in his affidavit upon which this pro-
33 ceeding is based, which are now due and unpaid, together with legal interest thereon from the date of their maturity, and the cost of this action, to wit:

$2,460, with interest from Oct. 15, 1858.
$2,460, with interest from April 15, 1859.
$2,460, with interest from Oct. 15, 1859.

$2,460, with interest from April 15, 1860.
$2,460, with interest from Oct'r 15, 1860.
$2,460, with interest from April 15, 1861.
$2,460, with interest from Oct'r 15, 1861.
$2,460, with interest from April 15, 1862.
$2,460, with interest from Oct'r 15, 1862.
$2,460, with interest from April 15, 1863.
$2,460, with interest from Oct'r 15, 1863.
$2,460, with interest from April 15, 1864.
$2,460, with interest from Oct. 15, 1864.
$2,460, with interest from Ap'l 15, 1865.
$2,460, with interest from Oct'r 15, 1865.
$2,460, with interest from April 15, 1866.
$2,460, with interest from Oct'r 15, 1866.
$2,460, with interest from April 15, 1867.

And his costs of this suit. And that said court do levy such taxes upon the taxable property in said county as may be required (with any funds already collected for the purpose of paying said coupons, and yet under their control) for the purpose aforesaid, and that they cause such taxes to be collected, (and with any money under their
34 control aforesaid,) deposited at the Bank of America, New York, ready for the payment of said coupons, and interest upon their presentation and delivery there.

It is further adjudged that the plaintiff do recover of the defendants his cost herein.

The plaintiff, Amey, by his counsel, now here in open court consenting thereto, the defendant, The Bath County Court, will not be required to levy, collect, and deposit at said bank more than one-third of the amount of the above indebtedness in any one year, unless they shall elect so to do.

The following is the mandamus:

Mandamus.

The United States of America to The County Court of Bath County, in the State of Kentucky, and to the judge and several justices composing said court, greeting:

Whereas, in a certain action lately pending in our circuit court for the district of Kentucky, wherein one Henry Amy was plaintiff, and said County Court, and the Presiding Judge and Justices composing said court, were defendants, it was found and adjudged to be the duty of said County Court, under and by virtue of the provisions of an
35 act of the general assembly of the Commonwealth of Kentucky, entitled "An act to incorporate The Lexington and Big Sandy Railroad Company," approved February 9th, 1852, and a certain other act of said assembly entitled "An act to amend the charter of The Lexington and Big Sandy Railroad Company," approved March 1st, 1854, to provide for the payment of certain coupons of interest warrants heretofore made and delivered by said County Court to The Lexington and Big Sandy Railroad Company, and now owned by said Amy, by annually levying a tax sufficient upon the taxable property in said county for the purpose paying said coupons, and causing the same to be collected and deposited at the Bank of America, in the city and State of New York, the place for the payment of said coupons; which duty

has remained neglected and unperformed for a long space of time, to the great damage of the said Amy:

We, therefore, being willing that justice shall be done in that behalf, do command you, and each of you, that you do forthwith make full and ample provision for the payment of the several coupons or interest warrants belonging to said Amy, and described in the aforesaid action, which are now due and unpaid, together with legal interest
36 thereon from the date of their maturity until paid; which coupons amount to the following sums, to wit:

$2,460	with	interest	from	October	15, 1858.
$2,460	"	"	"	April	15, 1859.
$2,460	"	"	"	October	15, 1859.
$2,460	"	"	"	April	15, 1860.
$2,460	"	"	"	October	15, 1860.
$2,460	"	"	"	April	15, 1861.
$2,460	"	"	"	October	15, 1861.
$2,460	"	"	"	April	15, 1862.
$2,460	"	"	"	October	15, 1862.
$2,460	"	"	"	April	15, 1863.
$2,460	"	"	"	October	15, 1863.
$2,460	"	"	"	April	15, 1864.
$2,460	"	"	"	October	15, 1864.
$2,460	"	"	"	April	15, 1865.
$2,460	"	"	"	October	15, 1865.
$2,460	"	"	"	April	15, 1866.
$2,460	"	"	"	October	15, 1866.
$2,460	"	"	"	April	15, 1867.

And $92 80, cost of said action and this writ; and that said County Court do forthwith levy such taxes upon the taxable property in said county as may be required for the purposes aforesaid; and that said County Court cause said taxes to be collected and deposited at
37 the Bank of America, in the city and State of New York, ready for the payment of said coupons and interest upon their presentation and delivery there. But said county court is not required to levy, collect, or deposit at said bank more than one-third of the amount of the above indebtedness in any one year unless it elects so to do.

And we enjoin you all and singular the matters for the speedy performance of the foregoing, according to the exigency of the law, you do and execute immediately, and that you sign'y your perfect compliance herewith by your return of this writ into the United States circuit court for the district of Kentucky, to be holden at Covington on or before the 3rd day of its next December term, lest for your default further complaint shall come to us.

In testimony whereof Salmon P. Chase, esqr., Chief Justice of the Supreme Court of the United States, hath caused the seal of our said court to be hereunto affixed, at the clerk's office of said court, in Covington, this 11th day of June, 1867, and in the 91st year of our independence.

[L. S.] N. B. STEPHENS, *C. C. C. K. D.*,
By J. M. BLACKBURN, *D'p'y.*

38 Upon which is the following return:

Executed in full by delivering a copy of the within writ to J. Ewing, Judge; B. F. Bradshaw, C. P. Van Pelt, F. M. Crow, Tho's Hendrix, J. G. Hart, Noble Wright, J. B. Huger, M. Collins, Cha's Glover, H. F.

Walker, N. R. Jones, W'm S. Hunt, L. H. Hackney, & C. Lyons, justices of the peace of the co. of Bath, August 3rd, 4th, & 5th, 1867.

W. A. JONES,
Deputy U. S. M., for W. A. Merriwether, U. S. Marshal, D. K'y.

Marshal's fees.

256 miles travel from Covington, Ky., to Bath Co., Ky., @ 6c. per mile	$14 16
Serving 15 copies of within writ, @ $2 00 each	30 00
	$44 16

UNITED STATES OF AMERICA, *Kentucky District, ss:*

I, James M. Blackburn, clerk of the circuit court of the United States for the district aforesaid, (at Covington,) certify that the foregoing (38) thirty-eight pages, this one included, contains a true & correct transcript of the record & proceedings of the cause mentioned in the caption
39 as the same remains on file in the records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my said office this 24th day of July, A. D. 1869.

[SEAL.] J. M. BLACKBURN,
C. C. C. K. D.

(Indorsed:) Henry Amy vs. Bath County Court. Transcript of record.

40 United States of America Supreme Court.

THE BATH COUNTY COURT, IN KENTUCKY, plaintiff,
vs.
HENRY AMY, DEFENDANT.

In error to the judgment of the circuit court, Ky. dist.

Now come J. Ewing, judge, and B. F. Bradshaw, C. P. Van Pelt, F. M. Crow, Tho's Hendrix, J. G. Hart, Noble Wright, J. B. Huger, M. Collins, Cha's Glover, H. F. Walker, N. R. Jones, W'm E. Hunt, L. H. Hackney, & J. C. Lyons, justices of the peace of the county of Bath, constituting the county court aforesaid, plaintiffs in error, and say that the judgment in the action of the said Henry Amy against the said Bath County Court, rendered by the said circuit court, granting unto the said Amy the peremptory writ of mandamus, commanding the said county court to levy the taxes on the taxable property of said
41 county, and to cause the same to be collected and paid to the said Amy in the sums, and at the times and places, and in the manner and form, as in said judgment set forth, is grossly erroneous and prejudicial to them, the said judge and justices as a court, and to the body of the people of the said county of Bath, whom they, the said judge and justices, represent in their official capacity, and they assign for error the following, to wit:

1st. The said circuit court erred in assuming jurisdiction to hear and determine the application of the plaintiff, now defendant in error, for the said peremptory writ of mandamus.

2nd. The said circuit court erred in its judgment of the law of the case, in overruling the motion of the defendants therein, now the plaintiffs in error, to dismiss the application of the said plaintiffs
42 therein, now defendant in error, for the peremptory writ of mandamus, to which the said defendants, now plaintiffs in error, then excepted and still except.

3rd. The said circuit court erred in its said judgment upon the issues of fact in said cause in finding the same for the said plaintiff, now defendant in error, and against the defendants, now the plaintiffs in error.

4th. The said circuit court erred in its said judgment in awarding said peremptory writ of mandamus to the said plaintiff, now defendant in error, against the defendants, now plaintiffs in error.

5th. The said circuit court erred in its said judgment in awarding costs to the said plaintiff, now defendant in error, against the defendants, now plaintiffs in error.

43 And the said defendants, now plaintiffs in error, pray that the appropriate writ of error may be granted them, directed, &c., commanding, &c., and that the judgment of the said circuit court, for the errors aforesaid therein contained, may be reversed, and the said cause remanded to the said circuit court, with instructions to dismiss the said motion of the said plaintiff, now defendant in error, for the peremptory writ of mandamus, and quash the said writ so awarded as aforesaid; and as in duty bound will ever pray.

J. B. BECK,
B. W. BRISTOW,
CARLISLE & O'HARA,
Att'ys for Pl'ffs in Error.

44 (Indorsed:) Bath County Court, Ky., vs. Henry Amy. Copy of record.

(Indorsement on record:) No. 465. The County of Bath et al., plaintiffs in error, vs. Henry Amy. Kentucky C. C. U. S.
Filed 15th July, 1870.

REC. 465—2

Supreme Court of the United States.

No. 233.—December Term, 1871.

The County of Bath and the County Court thereof, John D. Young, Presiding Judge, and J. G. Hurst et al., Justices, Plaintiffs in Error,

versus

Henry Amy, Defendant in Error.

In error to the Circuit Court of the United States for the District of Kentucky.

Brief and Argument for Plaintiffs in Error.

JAMES B. BECK,
JOHN G. CARLISLE,
MONTGOMERY BLAIR,
Counsel for Plaintiffs in Error.

Pearson, Printer, corner 9th & D sts., Washington, D. C.

Supreme Court of the United States.

No. 233.—December Term, 1871.

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versus

Henry Amy, Defendant in Error.

In error to the Circuit Court of the United States for the District of Kentucky.

Brief and Argument for Plaintiffs in Error.

STATEMENT.

This was a proceeding in the Circuit Court of the United States for the Kentucky District, by the defendant in error, Henry Amy, against the county of Bath and the county court of said county, and John D. Young, presiding judge, J. G. Hurst, G. W. Sorrell, and twelve other justices, for a mandamus to compel the levy and collection of a tax in the county of Bath to pay certain coupons or interest warrants attached to bonds alleged to have been issued by said county in payment of a subscription of $150,000 to the capital stock of the Lexington and

Big Sandy Railroad Company. A notice and demand were executed upon the proper officers of the county, and upon their failure to make the levy and collection, the proceeding in court was commenced by the filing of an affidavit, in which it was alleged, substantially, that, under and by virtue of an act of the General Assembly of the Commonwealth of Kentucky, approved January 9, 1852, entitled "An act to incorporate the Lexington and Big Sandy Railroad Company," and of an amendatory act, approved March 1, 1854, entitled "An act to amend the charter of the Lexington and Big Sandy Railroad Company," the said county was authorized to subscribe $150,000 to the capital stock of said railroad company, to borrow money for the purpose of paying such subscription, and to issue bonds as a security for the money so borrowed, or in payment of the subscription; that it was made the duty of the county court, by the terms of said acts, to levy and cause to be collected annually a tax upon the real and personal property in the county, sufficient to pay the interest upon any bonds that might be issued; that the county made the subscription to the full amount authorized, and in payment issued one hundred and fifty bonds for one thousand dollars each, payable to said railroad company at the Bank of America, New York, thirty years after date, with interest at the rate of six per centum per annum, payable semi-annually, for each instalment of which a coupon or interest warrant for $30 was attached to said bonds. It was further alleged that the bonds and coupons were delivered to the railroad company and were by it endorsed and sold in the market, and that the affiant had become the owner and holder of eighty-two of the bonds, whose serial numbers were stated, with the coupons annexed; that the county had paid the coupons maturing prior to October 15, 1858, and had levied a tax sufficient for that purpose in the years 1858, 1859, and 1860, but had refused to deposit the money at the Bank of America, and

that all the coupons maturing since said 15th day of October, 1858, remained unpaid. He filed one of the bonds with the coupons attached, alleging that the remaining eighty-one were in the same words and figures, and he prayed that a peremptory writ of mandamus might issue, directing the defendants to levy and cause to be collected a tax sufficient to pay off and discharge said coupons and the interest that had accrued upon them since maturity, and the costs, and commanding them to levy and collect, from year to year, a sufficient tax to pay off and discharge the several instalments of interest yet to become due.

Upon the filing of this affidavit, a rule, returnable next day, was issued against the defendants, requiring them to show cause why the writ of mandamus should not issue. On the same day, the defendants appeared, craved oyer of the bonds and coupons, and moved the court to discharge the motion and rule for a mandamus. At the same time eleven responses or pleas were filed.

The bond exhibited in the record is in the usual form of such securities, and acknowledges an indebtedness to "the Lexington and Big Sandy Railroad Company, *or* "*order*, in the sum of one thousand dollars, negotiable "and payable at the Bank of America, in the city of "New York, thirty years from the date hereof, upon the "presentation of this certificate, bearing an interest of "six per centum per annum from date, payable semi-"annually at said bank upon the presentation and de-"livery of the proper coupon thereto attached, signed "by the county clerk of said county."

The following is the form of the coupons:

"$1,000.—Certificate A, No. 3, Lexington and Big Sandy Railroad subscription, county of Bath, Kentucky, interest warrant No. 25, payable at the Bank of America, New York, on the 13th day of October, 1865. $30.

"R. H. CONNER,

"*Clerk of C. Court of Bath County.*"

After argument, the court below overruled the motion to discharge the rule, and thereupon the defendants took exceptions upon the record according to the practice in that court. A trial was then had upon the issues of fact presented by the pleas, but as no exceptions were taken it is not necessary to state here the several matters of defence relied upon. The third plea, however, embodies an agreement between the parties, setting forth so much of the acts of the General Assembly of Kentucky as relates to the subscription and the manner of providing for the paynent of the same, &c., &c. From the 28th section of the original act of incorporation, it appears that various counties, and among them the county of Bath, were authorized, upon a vote of the people, to make subscriptions to the capital stock of the company, and it was provided that "it shall be lawful for said cities and counties "so authorizing subscriptions to the capital stock of said "company, to raise the amount of their separate subscrip-"tions as the same shall be called for by the president "and directors of said road, *and* by a tax on the real and "personal estate of the said several cities and counties "subscribing, or by borrowing the amount thereof, pay-"able in the way and on the terms the said several may-"ors and councils, and the said several county courts, "may deem most advisable; *and the interest on all such* "*sums borrowed may be provided for in such manner as to* "*them seems best.*"

On the 9th day of May, 1867, the court rendered judgment directing a peremptory writ of mandamus to issue, commanding the defendants to levy and collect taxes sufficient to pay the coupons maturing from October 15, 1858, to April 15, 1867, inclusive, with interest on the same, amounting in the aggregate to more than $54,500 at the time of the judgment; and also requiring the moneys raised by the tax to be deposited at the Bank of America, New York, for the payment of the coupons and interest upon their presentation and delivery there. The

writ was accordingly issued, and this writ of error is now prosecuted to reverse the judgment.

POINTS.

The errors relied on by the plaintiffs in error are—

1st. That the circuit court had no jurisdiction to award the writ of mandamus in this case, there being no prior judgment therein, and said writ not being necessary for the exercise of its jurisdiction.—(1 Statutes at Large, chapter 20, sec. 14; Conkling's Treatise, p. 184; McIntire vs. Wood, 7 Cranch, 504; McClinney vs. Silliman, 6 Wheaton, 598; Beaty vs. City of Muscatine, 8 Wallace, 575; Com'rs of Knox County vs. Aspinwall, 24 Howard, 385; Riggs vs. Johnson Co., 6 Wallace, 166; Mayor vs. Lord, 9 Wallace, 409; and other authorities cited in the brief.)

2d. The circuit court erred in ordering a mandamus, because the manner of providing for the payment of the interest on the bonds was, by the express terms of the act of the Kentucky legislature, (see agreement, pages 8 and 9 of record,) left to the discretion of the county court—(McGarrahan vs. Secretary, 9 Wallace, 411; Riggs vs. Johnson Co., supra; Decatur vs. Paulding, 14 Peters, 497; Brashear vs. Mason, 6 Howard, 99; Gaines vs. Thompson, 7 Wallace, 353; Reeside vs. Walker, 11 Howard, 289.)

3d. That the circuit court had no jurisdiction over the subject-matter, the bonds and coupons being issued by one Kentucky corporation to another Kentucky corporation.—(1 Statutes at Large, chapter 20, sec. 11.)

ARGUMENT.

I. In this case the question is directly presented for the first time, so far as we know, whether the circuit courts of

the United States have jurisdiction to issue writs of mandamus to compel the levy and collection of taxes to pay municipal obligations, when there has been no previous judgment of the court in favor of the party holding the obligations, and no previous attempt made by the court to enforce their payment by its ordinary process. This question must depend for its solution upon the construction of the 14th section of the act of September, 24, 1789, commonly called the judiciary act. In that section it is declared "that all the before-mentioned courts of the "United States shall have power to issue writs of *scire* "*facias*, *habeas corpus*, and all other writs not specially "provided for by statute, which may be necessary for the "exercise of their respective jurisdictions, and agreeable "to the principles and usages of law."—(1 *Stat. at Large*, *ch.* 20, §14.)

It would seem that there ought to be but little difficulty in giving a proper construction to this clause of the statute. The words "which may be necessary for the exercise of their respective jurisdictions," were certainly inserted in the act for some purpose, and it is equally certain that they can serve no rational purpose whatever unless they are held to constitute a limitation or restriction upon the power of the courts to issue those "other writs not specially provided for by statute." That the writ of mandamus is one of those "other writs" will not, we presume, be disputed.—(*Conkling's Treatise*, *p.* 184; *McIntyre vs. Woods*, 7 *Cranch*, 504; *McCluny vs. Silliman*, 6 *Wheat.*, 598.)

If so a circuit court can not issue it unless it be necessary to enable it to exercise its jurisdiction; that is, in order to enable it to hear and determine some matter over which it has jurisdiction under the Constitution and laws of the United States, or to enable it to enforce its judgments already rendered in cases within its jurisdiction. For instance, mandamus will lie from a circuit to a district court to compel the latter to proceed to judg-

ment in a case subject to the appellate jurisdiction of the circuit court.—(*Smith vs. Jackson*, 1 *Paine*, 453.) In such a case it is necessary, in order to enable the circuit court to exercise its appellate jurisdiction. So it will lie from a circuit court to a state court to compel it to transfer a cause under the act of Congress.—(*Spraggins vs. County Court of Humphries*, 1 *Cooke*, 160.)

In the case of *McIntyre vs. Woods*, heretofore cited, an application was made to a circuit court for a mandamus against a register of the land office to compel him to issue a final certificate of purchase in order that the party might perfect a pre-emption right, and the question was brought to this court on a certificate of division of opinion. In the course of its judgment this court said: "We are of "opinion that the power of the circuit courts to issue the "writ of mandamus is confined *exclusively* to those cases "in which it may be necessary to the exercise of their "jurisdictions."

And in the case of *McClung vs. Silliman*, Mr. Justice Johnson, who also delivered the opinion in the case of *McIntyre vs. Woods*, said: "The fourteenth section of the "act under consideration (the judiciary act) could only "have been intended to vest the power now contended "for in cases where the jurisdiction *already exists* and not "where it is to be courted or acquired, by means of the "writ proposed to be sued out."

In the case now under consideration the circuit court asssumed jurisdiction merely for the purpose of issuing the writ as a distinct and independent remedy, and not for the purpose of enabling it to exercise its jurisdiction in any matter then pending before it, or to be thereafter brought before it. It assumed jurisdiction under the eleventh section of the judiciary act, as it would in an ordinary action of debt or assumpsit, upon the grounds that the parties were citizens of different states, and the amount in controversy exceeded five hundred dollars. To support this jurisdiction it is urged that mandamus is

"a suit of a civil nature at common law," and therefore not a mere incident to another action. We are at a loss to perceive the connection between the premise and the conclusion, for if it be conceded that it is a suit of a civil nature at common law, still it cannot be denied that the sole object of the suit is to procure the writ of mandamus, and, under the fourteenth section of the judiciary act, the court has no power to grant the writ unless it be necessary for the exercise of its jurisdiction. How, then, does it assist the jurisdiction merely to say that it is a suit of a civil nature at common law, and at the same time leave the restriction contained in the fourteenth section unexplained? Jurisdiction necessarily includes the power to render judgment and to enforce it. The only judgment that can be rendered in such a proceeding as this is, that a writ of mandamus do issue commanding the defendant to perform some act. Now, the eleventh section of the act confers original jurisdiction upon the circuit courts in certain classes of suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, while the fourteenth section of the same act does not permit these courts to issue the writ of mandamus, as this court has already decided, unless it be necessary for the exercise of their jurisdiction. We must construe the whole act together and give effect to all its parts. If we do so we find that in suits of a civil nature at common law for a mandamus there is an additional limitation upon the jurisdiction of the courts besides the citizenship of the parties and the amount in controversy. We find that the court has no jurisdiction of such a suit unless the issual of the writ, which is the object of the suit, is necessary in order to enable the court to exercise its jurisdiction in some other case. To say that the court must issue the writ in this particular case, in order to enable it to exercise jurisdiction in the case, is a palpable absurdity. In the case at bar the jurisdiction of the

circuit court had never attached to the subject-matter or the parties, in any manner or for any purpose, previous to the application for the mandamus, nor was it the object of the mandamus to bring any case into the court. How, then, could it possibly be necessary for the exercise of its jurisdiction? If the court had previously given a judgment for the amount of these coupons, and had found itself unable to enforce it by the ordinary process of the law, it might then have resorted to this extraordinary proceeding as the only means of exercising its jurisdiction. In every case where this court has sustained the jurisdiction of a circuit court, sitting in a state, to issue a writ of mandamus to compel municipal authorities to levy taxes, there had been a previous judgment in the same court and a return of "*nulla bona.*"—(See *Butz vs. City of Muscatine*, 8 *Wal.*, 575; *Commissioners of Knox County vs. Aspinwall*, 24 *How.*, 385; *Supervisors, &c., vs. United States, &c.*, 4 *Wal.*, 435; *Von Hoffman vs. City of Quincy*, 4 *Wal.*, 535; *City of Galena vs. Amy*, 5 *Wal.*, 705; *Walkley vs. City of Muscatine*, 6 *Wal.*, 481; *Mayor vs. Lord*, 9 *Wal.*, 409; *Riggs vs. Johnson County*, 6 *Wal.*, 166.)

We ask the particular attention of the court to the case last cited, and especially to that portion of the opinion printed on pages 187 and 188 of the report.

In the case of *Kendall vs. United States*, 12 Peters, 524, this court sustained the jurisdiction of the Circuit Court for the District of Columbia to issue a writ of mandamus against the Postmaster General, but the court was divided, the Chief Justice and two justices, Catron and Barbour, dissenting. It was not claimed, however, that the jurisdiction was derived from the act of 1789, but from the act of February 27, 1801, providing for the organization of a circuit court for the district. The authority of the cases of *McIntyre vs. Woods* and *McClung vs. Silliman* was fully recognized in the majority and dissenting opinions.

So far we have not disputed the proposition that the proceeding for a mandamus is a suit of a civil nature at common law. But is it true that it is such a suit, within the meaning of the judiciary act of 1789? Was it so understood and treated at the time of the passage of that act? It is well known that in England it was not originally considered a judicial proceeding at all, but was a prerogative process issuing out of the Court of King's Bench alone, upon the ground that no suit at law or in equity could afford the party the relief to which he was entitled. Originally the king attended upon that court in person and aided in the administration of justice. He was the fountain of justice, and if the laws did not afford an adequate remedy by the ordinary forms of judicial proceedings, his prerogative writ of mandamus was issued to enforce the execution of the laws. Instead, therefore, of being a suit at law it was a proceeding which could be resorted to only in those cases where a suit at law would not secure the legal rights of the party. After the statute of the 9th of Anne, which authorized pleadings in the proceeding for a mandamus, such proceedings were held to be in the nature of an action, but the writ was still a prerogative process, and still continued to be issued in those cases only where a suit at law or in equity afforded no sufficient remedy. Although not a prerogative writ in this country, it was, nevertheless, a peculiar process, and was everywhere regarded as something quite different from a suit of a civil nature at common law, or in equity, in the ordinary acceptance of those terms. It is evident that it was so regarded by the framers of the act of 1789, and we have shown that it was so regarded by this court upon at least two occasions when the question came under its consideration. It is true that it has sometimes been said to be an "action" or a "suit," but in no case has it ever been held to be such a suit as was contemplated by the eleventh section of the judiciary act. In the case of *Kendall vs. U. S.*, 12 Peters,

where it is spoken of for the first time by this court as a case, suit, or action, it was not intimated that it was embraced by that section of the statute. On the contrary, the court said, on page 618 of the report:. "It must be "admitted, under the doctrine of this court in the case "referred to, that unless the circuit court of this district "is vested with broader powers and jurisdiction in this "respect than is vested in the circuit courts of the United "States in the several states, then the mandamus in the "present case was issued without authority."

And again, on pages 621 and 622, it is expressly stated that the power of the circuit courts to issue the writ of mandamus is derived from the fourteenth section of the act, and that it is used in a special modified manner, and and does not stand on the same footing as in the District of Columbia. There is nothing in the case of *Kendall vs. United States*, 3 How., 99, or *Commonwealth of Kentucky vs. Dennison*, 24 How., 97, indicating that the court considered the proceeding for a mandamus as a suit of a civil nature at common law in the sense in which those terms are used in the judiciary act.

II. In determining the question of jurisdiction the court must look to the result of the proceeding rather than to its form. If the court has no power to render the only judgment which is appropriate to the nature of the proceeding, it of course has no jurisdiction of the case. It is precisely at this point that counsel for the defendant failed in their argument in the court below. They insisted that this was a suit, and that under the eleventh section of the statute the circuit court had jurisdiction of suits where the parties were citizens of different states and the amount in dispute exceeded five hundred dollars. But the argument omitted all consideration of the fact that the remedy sought was one which the court could give only upon the condition specified in the fourteenth section.

On the proposition that the court cannot now award a

mandamus against officials who have a discretion in the performance of a duty, weneed not do more than quote the language of this court in the case of McGarrahan vs. The Secretary, 9 Wallace, 311. The court therein says:

"Since the decision of this court in the case of Mc-
"Intyre vs. Woods, (7 Cranch, 504,) it has been regarded
"as the settled rule of this court that the circuit courts
"of the United States in the several states do not possess
"the power to issue writs of mandamus except in cases
"in which it may be necessary to the exercise of their
"jurisdiction.—(Riggs vs. Johnson, 6 Wallace, 190.) Au-
"thority to that effect might doubtless be given to these
"courts by an act of Congress, but the insuperable diffi-
"culty at present is that neither the judiciary act nor any
"other act of Congress has conferred upon them such
"power. Antecedent to the decision of this court in the
"case of Kendall vs. U. S., 12 Peters, 608, grave doubts
"were entertained whether any courts established by an
"act of Congress possessed any such jurisdiction; * *
"and in all the subsequent cases the principle is strictly
"limited to the enforcement of mere ministerial acts not
"involving the necessity of taking proofs, and it has
"never extended to cases where controverted matters
"were to be judicially heard and decided by the officer
"to whom the writ is requested to be addressed.—(De-
"catur vs. Paulding, 14 Peters, 497; Brashear vs. Mason,
"6 Howard, 99.)

"Though mandamus may sometimes lie against an ex-
"ecutive officer to compel him to perform a mere minis-
"terial act required of him by law, yet such an officer, to
"whom public duties are confided by law, is not subject
"to the control of the courts in the exercise of the judg-
"ment and discretion which the law imposes in him as
"part of his official functions.—(Gaines vs. Thompson,
"7 Wallace, 453; Reeside vs. Walker, 11 Howard, 289."

We consider the decision of the court, above quoted, as conclusive in favor of the plaintiffs in error, under the discretion vested in them by the act of the legislature of Kentucky, set forth on page 9 of the record, which reads thus:

"And it shall be lawful for said cities and counties so

authorizing subscriptions to the capital stock of said company, to raise the amount of their separate subscriptions as the same shall be called by the president and directors of said road, and by a tax on the real and personal estate of the said several cities and counties subscribing, or by borrowing the amount thereof, payable in the way and on the terms the said several mayors and councils and the said several county courts may deem most advisable; and the interst on all such sums borrowed may be provided for in such manner as to them seems best."

III. But the jurisdiction of the court below must be defeated upon another distinct ground. The eleventh section of the judiciary act provides that "no district or circuit "court shall have cognizance of any suit to recover the "contents of any promissory note or other chose in action "in favor of an assignee, unless a suit might have been "prosecuted in said court to recover the said contents if "no assignment had been made, except in cases of foreign "bills of enchange."

As heretofore stated the bonds set up in this case by the defendant in error were all made payable to the Lexington and Big Sandy Railroad Company or order, and were endorsed by that corporation and sold in the market. It was a Kentucky corporation and a citizen of the same state with the plaintiffs in error, and could not, therefore, have sued them in a United States court to recover the contents of the bonds. If the defendant in error holds under that assignment, and if this is substantially an action to recover any part of the contents of the thing assigned, the court below had no jurisdiction of his case. His counsel, however, in the court below, contended, *first*, that this was not an action to recover the contents of an instrument, within the meaning of the statute; and, *second*, if it was such an action the party was not claiming under an assignment, but was suing upon the coupons, which passed by delivery.

We will examine these points briefly. What is a suit

to recover the contents of an instrument? Is it not simply a suit, no matter what its form may be, to enforce payment of the obligation contained in the instrument? Substantially it can make no difference whatever whether the action be assumpsit, in which the judgment is enforced by the writ of *fieri facias*, or an action like the present, in which the court peremptorily commands the defendant to raise the money and pay it to the plaintiff by a certain day. The object is precisely the same in both actions, and it is as certainly accomplished in one as in the other. Any attempt to draw a distinction between them, upon the ground that one merges the chose in action in the judgment while technically the other does not, is simply an attempt to show a distinction without a difference. If the effect of the judgment is to compel the defendant to pay the money it certainly cannot be said that the plaintiff does not recover it. The case at bar bears no shadow of resemblance to the case of *Deshler vs. Dodge*, 16 *How.*, 622, which was relied on in the court below. That was a case of replevin to recover bank notes. It was not a suit to enforce the contract by a recovery of the thing promised to be paid, but a suit to recover possession of the obligation itself. Nor was it a suit against the parties who made the notes or against any one liable on the contract. Besides this the notes sued for were all payable to bearer, and were, therefore, original promises to every holder in succession. Yet even in such a case this court was not unanimous in its judgment. The court said: "We are of the opinion that this clause of the "statute has no application to the case of a suit by the "assignee of a chose in action to recover possession of "the thing in specie, or damages for its wrongful capture "or detention, and that it applies only to cases in which "the suit is brought to recover the contents *or to enforce* "*the contract contained in the instrument assigned.*"

In the present case the action is brought against the party who made the contract, and it is brought on the

contract itself for the purpose of enforcing it. It is true that certain officers of the county, who are not individually liable on the contract, are also made parties, but they are joined in order that the court may, by acting upon them, enforce the contract more speedily and effectually. By the judgment the county authorities are not only compelled to levy and collect the tax, but to deposit the money at the Bank of America, in New York, for the defendant in error. They have no right to deposit it there generally, as they would keep other funds in such an institution, or to deposit it there with directions to pay any or all coupons that may be presented, but it must be for the defendant in error alone and in discharge of his claim, as set out in the judgment. They have no more power over the money after it is remitted to the bank than they would have over money after they had paid it to the marshal upon an execution. It is a mere abuse of terms to say that this is not, in substance and in fact, a recovery of the contents of the instrument. In the case of *Kendall vs. Stokes*, 3 *How.*, 87, this court stated very clearly the legal effect of such a proceeding as this, and held that it constituted a bar to any subsequent action, even for damages. In a case between the same parties, heretofore cited, (12 *Peters*, 524,) a mandamus was awarded against Kendall to compel him to enter a credit on the books of the Post Office Department for an amount of money awarded to Stokes and others by the solicitor. The second action was brought against Kendall for refusing to give the credit, and the plaintiffs claimed damages. This court held that they had chosen their remedy and had recovered, and that the first action was a bar to any further suit. In the course of the opinion it was said: "The object and effect of that "entry was to discharge the plaintiffs from so much "money, if on other accounts they were debtors to that "amount; and if no other debt was due from them to the "United States, the credit entitled them to receive at

"once from the government the amount credited. The "action of mandamus was brought to recover it, and the "plaintiffs show, by their evidence, that they did recover "it in that suit."

We submit that the counsel for defendant in error are altogether mistaken when they insist, as they did in the court below, that he could maintain an action of debt against the county for this same money, notwithstanding the judgment in this case. But, as our purpose is to make suggestions rather than argument, we pass to the second point made for the defendant in error on this branch of the case.

The point is, that this is a proceeding upon the coupons, and not upon the bonds, and that the coupons are independent negotiable contracts, and pass by delivery, with or without the bonds to which they are attached. In the first place this does not purport to be a proceeding or action upon the coupons as distinct or detached instruments, but they are set up as mere incidents to, or parts of, the bonds. The execution and *endorsement* of the bonds are set forth, and the covenant contained in them to pay interest semi-annually, at the rate of six per cent. per annum, is also set up and relied upon in the affidavit; and a part of the relief prayed for was that the county authorities should be commanded to levy and collect, from year to year, sufficient taxes to pay off the several instalments of interest yet to become due before the maturity of said bonds. It is evident that he was founding his action upon the obligation contained in the bonds, and not upon each separate coupon. It is true that the coupons are mentioned, but their substance is not even set out. It is not alleged that they were signed by anybody, or contained a promise to pay anything. Neither the original act authorizing the subscription, nor the subsequent one ratifying it, says anything about coupons or interest warrants, and we suggest that the county authorities had no power to issue them except as parts of the

bonds. They are, in fact, parts of the bonds, and are so treated in the notice and affidavit of the defendant in error. We do not intend to say that coupons or interest warrants may not be so drawn and executed as to make them separate and distinct negotiable instruments, but we say simply that *it has not been done in this case.* And in a case where they have been so drawn and executed the party who holds the bonds and coupons is not bound to sue on the coupons separately, but may proceed upon the covenant in the bond. This is what the defendant in error elected to do. He alleged the execution of the bonds with as much particularity and precision as if he were bringing an action of debt upon them; and he actually obtained judgment for $2,460 for interest maturing April 15, 1867, when it is not alleged, either in his notice to the county authorities, or in the affidavit filed in court, that he was the holder of any coupons maturing at that date. His affidavit was filed December 7, 1866. That was the beginning of his action or suit; and, if it was founded upon the coupons, it was certainly erroneous to give him a judgment upon eighty-two of those separate and distinct obligations which had not matured when the action was commenced, and which were not mentioned in his complaint. Such a proceeding could only be regular, if at all, upon the idea that the action was upon the entire or continuing obligations or covenants contained in the body of the bonds.

None of these coupons had ever, in fact, been detached from the bonds and put in circulation as separate instruments. They were still annexed to the bonds and passed with them, under the endorsement of the railroad company, to the first purchaser, and so on down to the defendant in error; and an inspection of his affidavit will show that he does not claim them otherwise than by virtue of that endorsement. He demands the interest because he owns the bonds.

But, whether this is technically a suit upon the cou-

pons or a suit upon the bonds, the controlling question still remains—Did not the defendant in error in fact recover a part of the contents of the bonds? We think it very clear that he did, and shall briefly state our reasons. Each bond contains upon its face an express obligation, or covenant, to pay the interest semi-annually. This is just as much a part of the bond as the obligation to pay the principal sum itself. To facilitate the collection of this interest, and preserve evidence of its payment, a warrant is attached authorizing the person entitled to any instalment of the interest to receive it upon the presentation and delivery of the certificate. But the covenant in the bond still remains in force until the instalment is actually paid. It is not satisfied by the mere execution of the coupons or warrants, any more than the first part of a bill of exchange is satisfied or canceled by the execution of the duplicates. It is satisfied, however, by a suit in which a recovery is had and payment of the money coerced. Now, it seems plain to us that the suit which effects this is a suit to recover a part of the contents of the bond. It enforces the contract contained in the assigned instrument, and it constitutes a complete bar to any future action for the interest recovered. The coupons are mere incidents of the bonds, and if the bond is sold they pass with it, unless expressly reserved. If the bonds are made payable to bearer, as was the case in *Knox County vs. Aspinwall*, 21 *How.*, 540, and *Wood vs. Lawrence*, 1 *Black*, 404, of course no assignment will be necessary to pass the title. In *Amy vs. Alleghany City* it is said that the bonds were payable to order, but the form of the coupons is not stated. We suppose they were complete contracts of themselves and payable to bearer. In the present case the coupons were mere memoranda, and contain no words of promise. Detached from the bonds they are unintelligible. It is impossible to tell from the coupons alone what the instalment of interest is, whether it is $1,000 or $30. They do not purport to be payable

to bearer, and when we look to the bonds, as we are compelled to do in order to understand the coupons, we find that the interest, like the principal, is payable to the Lexington and Big Sandy Railroad Company, *or order*. It would be impossible for any one, except the railroad company, to maintain an action in any court for the recovery of any of these instalments of interest without alleging the assignment of the bonds.

But we will not trouble the court with further argument upon this branch of the case. We are satisfied that enough has been suggested to show that the court below had no jurisdiction, and that the judgment should be reversed for that reason.

JAMES B. BECK,
JOHN G. CARLISLE,
MONTGOMERY BLAIR,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

Winter Term, 1870--71.

ERROR TO THE UNITED STATES CIRCUIT COURT
FOR THE DISTRICT OF KENTUCKY.

THE COUNTY OF BATH, *Plaintiff in Error,*
Against,
HENRY AMY, *Defendant in Error.*

BRIEF FOR THE DEFENDANT IN ERROR.

JOHN W. STEVENSON &
HARVEY MYERS,
Attorneys for Amy.

L. D. Croninger Print, Corner 5th and Madison Streets, Covington, Ky

Supreme Court of the United States.

Winter Term, 1870--71.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

THE COUNTY OF BATH, *Plaintiff in Error,*
Against } *Brief for the Def't. in Error.*
HENRY AMY, *Defendant in Error.*

THE Lexington & Big Sandy Railroad Company was incorporated by an act of the General Assembly of Kentucky, approved the 9th of January, 1852. By its charter the several Counties through which its contemplated road was to run, were authorized to subscribe to the capital stock of the Company, provided a majority of the voters in the County should, at an election held for that purpose, vote in favor of the sub-

scription. The act authorizes the County Courts of the Counties to pay their subscriptions by borrowing the amount thereof, payable in the way, and on the terms the said County Courts may deem most advisable; and the interest on all such sums borrowed may be provided for in such manner as to the County Courts seems best, provided that all taxes laid to pay the principal and interest, or either, shall be pledged and sacredly appropriated to such purpose and no other. A subsequent act required the County Courts of the Counties subscribing stock to issue bonds, and to proceed to levy, assess and collect a tax to pay the interest thereon according to the true intent and meaning of the previous act.

The County of Bath was authorized to subscribe $150,000 to the capital stock of the road. The County subscribed this amount of stock, and issued 150 bonds of $1,000 each, dated the 15th of April, 1853, payable to the Railroad Company or order, thirty years from date, with interest payable semi-annually, for which coupons were annexed. The bonds contain on their face this recital:

"This certificate is issued in part payment of the subscription of $150,000 by Bath County to the Capital Stock of said Lexington & Big Sandy Railroad Company, by order of the County Court of said County, as authorized by a vote of the people of said County taken in pursuance of an act of the General Assembly of the Commonwealth of Kentucky, incorporating said Railroad Company, approved the 9th of January, 1852."

These bonds were tendered to, and received by the Company in payment and satisfaction of the subscription of stock. The Company, by its indorsement on the bonds, made them payable to bearer, and sold them and put them in circulation.

The County Court levied the tax and paid the interest for five years, and then stopped payment.

The defendant in error, being the holder of eighty-two of these bonds, with the past due and unpaid coupons, did in the month of November, 1866, make a written demand upon the presiding Judge and each of the Justices of the Peace in the County, (who together compose the County Court), that the Court should forthwith levy the necessary tax to pay his coupons, and notified each of them that if they did not do so, he would on the 2nd day of the next term of the United States Circuit Court sitting in the District move the Court for the writ of Mandamus requiring them to levy and cause to be collected a sufficient tax to pay his coupons.

No tax was levied. On the 2nd day of the December term, 1866, of the Circuit Court, Amy filed his written affidavit in the nature of an information, setting forth specifically all of the facts in reference to the issual of the bonds: that he was the holder of eighty-two of them, with the coupons annexed, and that no coupon had been paid which had matured since 1858. Also setting forth his demand on the County Court to levy the tax, their refusal to do so, and concluding with a prayer for the writ of Mandamus requiring the tax to be levied.

The Court granted a rule against the County to show cause why the writ should not issue. The County came and craved oyer of the bonds and coupons, which was had, upon which it moved the Court to discharge the rule ; and also filed a response to the rule setting forth eleven distinct points of defense.

By agreement of counsel a general traverse of the facts set out in the response was entered on the record, and the law and facts submitted to the Court for trial and decision. Upon the trial, the Court found the issues for the plaintiff, and awarded the writ.

No bill of exceptions was taken at the trial. This Court

will therefore presume that the testimony upon the trial warranted the finding of the Court upon all questions of *fact* raised by the response.

The only question open for consideration here is, as we conceive, whether Amy by the information he filed in the Circuit Court, presented a *prima facie* case, warranting that Court in awarding him the writ of Mandamus. This we apprehend will be disputed upon two grounds, both of which are leveled at the jurisdiction of the Circuit Court.

1. It is claimed that the Circuit Court had no jurisdiction to issue the writ until the relator had reduced his demand to judgment, and had an execution returned, 'no property' thereon.

2. That it had no jurisdiction because the proceeding was one to recover the contents of choses in action by a party who claimed in virtue of an assignment, and that as the assignor, (the Lexington & Big Sandy Railroad Co.), could not maintain the action in the national courts to recover the contents of the coupons, the relator, Amy, as assignee of the Company, cannot do so.

I.

Was it necessary that the relator should reduce his demand to judgment and have a return of 'no property' thereon before the Circuit Court could award him this writ?

A number of cases have recently been before this Court in which a return of 'no property' was had before the writ was applied for, but we know of no case where the Court has decided that this was a pre-requisite to the jurisdiction of the Court to award the writ, and believe that upon principle and authority, the contrary doctrine can be sustained.

1. Mandamus is a common law action—a suit of a civil nature. It is so held by this court and by the courts of the State of Kentucky, where this cause originated.

In *Kendall v. The United States*, (12 Peters, 615), it is held to be too well settled, "that the proceeding in a mandamus *is a case, within the meaning of the Act of Congress*, to require any particular notice. It is an *action*, or *suit*, brought in a court of justice asserting a right, and is prosecuted according to the forms of judicial proceeding."

In the case of *Kendall vs. Stokes*, (3 Howard, 99), this court, alluding of the preceeding case of *Kendall vs. The United States*, says:

"The court in that case, speaking of the nature and character of the proceedings by mandamus, which had been fully argued at the bar, said that it was an action of suit brought in a court of justice asserting a right, and prosecuted according to the forms of judicial proceeding, and that a party was entitled to it whenever there was no other adequate remedy."

In the case of the *Commonwealth of Kentucky vs. Dennison*, (24 Howard, 97), this court said:

"It is equally well settled, that a mandamus in modern practice, *is nothing more than an action at law between the parties.*"

The same doctrine is held in numerous cases in Kentucky.

Maddox, &c., v. Graham & Knox, 2 Metcalfe's Ky. Reports, pg. 56.

Justices of Clark Co., v. A Turnpike Co., 11 B. Monroe Ky. Reports, pg. 154.

Proceedings by mandamus in the courts of Kentucky

were regulated by an act of the General Assembly of Kentucky, approved January 8th, 1813. This act was not repealed by the Revised Statutes of Kentucky, but is still in force.

Maddox v. Graham &c., 2 Met., (Ky.,) Rep., pg. 69.

The second Section of this act provides:

"That it shall be lawful for the person or persons at whose instance a mandamus has been, or may hereafter be issued, in any case, to traverse the truth of the whole, or any one or more of the facts asserted in the return made to such writ by the court or officer to whom the same may have been directed, the traverser concluding the same by an appeal to the country for the trial of the contested facts, upon which issue may have been taken by such traverse. A jury shall be empannelled and sworn by order of the court having jurisdiction thereof, subject to the same rules and regulations, and with power to such courts to superintend and control such jury, by instructing them in points of law which may arise in the course of such trial, or of granting new trials in the same manner, and to be governed by the same principles which are applicable to the trial by jury in other cases at common law.

"SEC. 3. It shall be the duty of such court upon the result of any such finding as aforesaid, to pronounce judgment thereon in favor of either party according to law, and to award judgment for the costs of suing out or defending such mandamus as the case may be, in favor of the successful party, upon which execution shall and may be issued as in other cases."

This act makes the proceedings by mandamus in Kentucky, *a civil action.* The parties plead to issue. Issues of fact are to be tried by jury; issues of law, by the court. Judgment is to be awarded, and execution issued thereon.

This act was in force when the act of Congress of May 19th, 1828, was adopted, providing that the proceedings in suits at common law, in States admitted to the Union since 1789, shall be the same in the National Courts in each of said States, as are now used in the highest courts of origi-

nal and general jurisdiction of those States. Kentucky was admitted after 1789.

It is therefore submitted that the above act of the General Assembly of Kentucky of 1813, is adopted as a part of the practice in the National Courts in Kentucky.

The Code of practice of Kentucky adopted in 1854, regulates the action of mandamus. Section 523 provides that the applicant for the writ shall file a petition, (all pleadings by a plaintiff are styled '*petitions*' by this code), wherein he shall state the cause and ground of his application, to which the party against whom the mandamus is sought, may file an answer, wherein he shall state the reason why the writ should not be granted.

Section 524 provides that the court shall hear and dicide all questions of law or fact arising on the motion, and the granting or refusing the writ shall be the final order in the motion.

From the foregoing authorities it is submitted that a proceeding for the writ of mandamus is *a suit of a civil nature at common law;* not a mere incident to another suit, and that it is so held and treated by this court, as well as by the law and courts of the State of Kentucky.

2. By the 11th Section of the Judiciary Act of 1789, it is enacted that—

"The Circuit Court shall have original cognizance concurrant with the courts of the several States, of all suits *of a civil nature at common law*, * * * between a citizen of the State where the suit was brought, and a citizen of another State."

This jurisdiction is *concurrent* with that of the courts of

the States. The remedies to which a party would be entitled in the State Courts, are by this act, to be administered by the National Courts whenever a party is so situated that he has a right to appeal to those courts. The National Court is simply substituted to the place of the State Court in administering the State law and remedy, where the parties are citizens of different States.

3. Now by the course of proceeding in the State of Kentucky, it is not necessary that a party who has a right to have a tax levied by a County Court or City Council to pay his demand, *should reduce the demand to judgment* before applying for the writ of mandamus requiring the levy of the tax.

In the case of the *Justices of Clark Co. v. A Turnpike Company*, (11 Ben. Monroe, (Ky.), 154), the County Court of Clark County had been authorized by an act of the General Assembly to subscribe stock in a Turnpike Company, and to levy and collect a tax upon the taxable property of the County to pay such subscription. They subscribed $5,000 to the capital stock of the Company, but afterwards refused to pay it. The Turnpike Company proceeded in the first instance, and without having obtained a judgment and return of 'no property,' for a mandamus upon the Justices of the County Court requiring them to levy the tax, and the Circuit Court awarded the writ, and the Court of Appeals affirmed the judgment. In principle the case is precisely like the one at bar.

The case of *Maddox v. Graham & Knox*, (2 Metcalfe, Ky., 56), is in every essential feature like the one at bar. There the City of Maysville had subscribed stock to the Maysville & Lexington Railroad Company, and had issued

bonds to the Company, with coupons attached, in payment of the subscription. The bonds were sold, and Graham & Knox became the owners of part of them on which the City failed to pay the coupons. The act authorizing the City to issue the bonds provided, (as in the case at bar), for the levy of a tax by the City Council to meet the interest and principal of the bonds.

Graham & Knox brought their action for a mandamus against the City Council to require them to levy a tax to pay off the coupons. No judgment had been obtained against the City on the coupons. The case was argued with great zeal, and at great length, by eminent counsel. The Circuit Court awarded the writ, and on appeal the appellate Court affirmed the judgment. And this is the settled practice in Kentucky. Where a party has the right to have a County Court or City Councel levy a tax to meet his demand, and there is a neglect to make the levy, he may demand of them that they shall levy the tax, and upon their refusal, may proceed in the first instance for the writ.

This court will award to the citizen of another State the same relief that the State Court would give one of its own citizens in a case arising upon the statute laws of that State.

If Amy had brought this action in one of the State courts of Kentucky, simply seeking a mandamus there can be no doubt that the State Court would award him the writ according to the cases we have cited above, notwithstanding he had not reduced his demand to judgment, and had execution thereon returned 'no property.'

But now let us suppose, that after commencing such a suit for a mandamus in the State court, he should remove

the action for trial into the United States Circuit Court under the act of March 2d, 1867. (*14 Statutes at Large, pg. 558.*) Is it to be doubted that it would be the duty of that court, upon such removal, to award him the writ just as the State court would have done had there been no removal; and that, notwithstanding their had been no judgment or return of *nulla bona?* We apprehend that he would be awarded the same relief that he would have been entitled to had he proceeded to judgment in the State court.

But if he would be entitled to the writ upon a removal, as suggested above, why should he not likewise have it where he commences his suit in the National court in the first instance? There can be no appreciable distinction between the cases. The Circuit Court would award him the writ where he removed the case from the State court, because, by the State law he is entitled to it without having reduced the demand to judgment. And for the same reason, to-wit, that it is a remedy to which he is entitled by the State law without first procuring a judgment, should the Circuit Court award the writ when the action is commenced in it in the first instance. A distinction between the two cases would not rest upon any solid foundation, or tend in any manner to subserve substantial justice.

4. The law compels no man to a vain and useless act. Of what use to require this plaintiff to go to the great labor, expense and delay of getting a judgment for his debt, and having an execution returned 'no property,' when it is judicially known in advance that the County of Bath has no property subject to execution, *and that it is unlawful for the County officers to pay this debt in any other way than by the levy and collection of the tax prescribed*

in the act which authorized her to issue the bonds?

Counties in Kentucky are mere political divisions of the State. They are not corporations. They have no capital stock. They have no money. They have no property except that of a public character, which cannot be taken in execution. They have no treasury or treasurer, nor are they authorized to raise money by taxation or otherwise to put in a treasury.

The fiscal affairs of the several Counties are regulated by Chapter 26 of the Revised Statutes of Kentucky, (*1 Stanton, 295*), and are managed by the County Court. This court sets every month, but its session in the month of October each year, is termed the Court of Claims. Persons having demands against the County not otherwise provided for, present their demands to this court for allowance. Such as are allowed are entered upon the order book, and summed up. All male persons in the Couty over twenty-one years of age are denomenated '*tithables*,' and the tithables are enumerated each year by the assessor when he assesses the State tax upon the property of the County.

The Court of Claims, after ascertaining and summing up the claims against the County, apportions them among the tithables, and levies a head tax upon these tithables, not exceeding $1,50 per head in any year, to pay the claims so allowed. A list of these claims is delivered to the sheriff, and it is made his duty to collect this head tax, and with it pay the respective claims upon his list.

This is the only method prescribed by the general law of Kentucky in which demands upon the County can be paid. It will be seen that these demands *are apportioned equally among the male inhabitants of the County, irrespective of whether they are property holders or not.* In

short it is a capitation tax, and not a tax upon property.

Now the act of the General Assembly which authorized Bath County to subscribe to the capital stock of this Railroad Company, and to issue these bonds, provides also that it shall be the duty of the County Court to annually levy and collect a tax from the *property* of the County, with which to pay the principal and interest of the bonds.

The object of the subscription authorized by the statute, was to promote the construction of the railroad through the County. It was supposed such a road would greatly enhance the value of the property therein. Hence the tax was imposed upon the *property*, and not upon the tithables.

The County Court of Bath County has but two ways in which to raise money for the payment of debts: the first by a tax upon the tithables under the general law; the second by a tax upon the property of the County, laid in the manner, and for the purposes prescribed by the act under which these bonds were issued.

The County Court has no power or authority to lay a tax upon the tithables to meet the principal and interest of these bonds. The tithables could well say they were not bound for such a tax, and could enjoin its collection.

The statute authorizing the issual of the bonds, prescribes the exact manner in which the means are to be raised for the payment of them, and the interest accruing on them; *and it is not lawful for the County Court to pay them in any other way.* Authority is vested in the County Court to annually levy and collect the tax necessary to meet the interest on these bonds. The holders of the bonds have a vested interest in the execution of this power. After the County Court had issued and sold the bonds, it be-

came the duty of that court to provide for the interest by the necessary tax. It is a duty about which the County Court has no discretion. It is a duty which the bondholder has a right to have *regularly* and *promptly* performed. It was not the bargain that he was to go to the great trouble, delay and expense of suing the County to insolvency before he should have a right to demand the levy and collection of this tax.

Why then should this plaintiff be subjected to the expense and delay of getting a judgment and having a return of 'no property' before he can demand the performance of that duty, which is a part of his contract, and upon the faith of which he bought these bonds ? And that when it is judicially certain before he commences his suit, that it is a barren form : that it must result in nothing but delay and expense : that it is not lawful for the County to pay his bonds otherwise than by a tax imposed upon the property by the County Court, and that the writ of *fieri facias* is important to compel the levy of such a tax.

It is not the policy of the courts to interpose mere formal obstacles in the way of the collection of debts. It is to the advantage of the debtor class that this should not be so. The capitalist is wary of advancing his money to a borrower who can take refuge in a labyrinth of subtleties to baffle payment. He will not loan except at a discount that covers these contingencies. All this comes, not out him, but out of the needy borrower, who realizes for his securities far less than what he would were the remedy for non-payment prompt, simple and decisive.

5. A party is entitled to this writ where he has no other *adequate* legal remedy. It is not sufficient that he may

have some sort of remedy. It must be a remedy which is adequate and complete, competent to afford him *the full measure of his right.* Otherwise he will not be refused this writ.

In *Kendall v. The United States*, it was objected that the party applying for the writ had his remedy by action for damages. It was admitted by the court that he could have sued for damages, but the court says:

"The remedy by action would have nothing real in it. It would be a remedy in name only, and not in substance, especially where the amount of damages is beyond the power of the party to pay." 12 *Peters*, 615.

When that case was again before this court, the above principle was cited and adhered to in the opinion then delivered. The court says, that when the case was formerly before it, it had been held—

"That a party was entitled to it, [mandamus], when there was no other *adequate* remedy, and that although in the case then before them the plaintiffs in the court below might have brought their action against the defendant for damages on account of his refusal to give the credit directed by the act of Congress, yet as the remedy *might not be adequate* to afford redress, they were, as a matter of right, entitled to pursue the remedy of mandamus."

Kendall v. Stokes, 3 Howard, 99.

And this is the settled law upon the subject.

Tappen on Mandamus, pg. [*9–20*].

Now it is judicially certain from the character of a County in Kentucky, and from the method prescribed by the Legislature of that State for the payment of these bonds, that the remedy by action for their collection would not merely be inadequate, but utterly barren of any result to the relator except the labor, cost and delay of pursuing it.

6. But upon another ground the proceeding is sustainable. These bonds and coupons are the obligations of the County. An action to recover upon them must be brought *against the County*, and judgment and execution would go *against the County*.

But it is a part of the act under which the bonds were issued, and consequently a part of the contract with the bondholder, that certain officers in this County should perform certain duties: to-wit, that they should annually levy and cause to be collected, a tax sufficient to meet the interest upon these bonds.

These County officers do not owe these bonds; they are not their obligations. Hence we cannot maintain an action against those officers to recover the debt from them. And if we could, they might be insolvent. But we have a right to have *this duty* performed by these officers, and when we proceed against them to compel a specific performance of their duty, it is no answer for them to say we could have sued somebody else; the County for instance. We have a right to sue *them*, and unless they can show that we have some other adequate remedy *against them*, the court will not deny us this writ. An action for damage against these officers for non-performance of their duty is no such adequate remedy, as was held in *Kendall v. the United States*.

II.

It is claimed by the plaintiff in error that this was an action to recover the contents of an assigned instrument in a case where the assignor, (the Lexington & Big Sandy Railroad Company), could not sue for the contents in the

United States Circuit Court for the District of Kentucky, and therefore that Amy, as the assignee, could not maintain the action under the 11th Section of the judiciary act.

The position is at first sight seems plausable, but it will not bear the test of a close scrutiny.

1. This is not an action to *recover the contents* of an instrument. Although certain choses in action are remotely connected with the case, still no judgment was sought or obtained for their contents. In order to recover the contents of an instrument, the character of the debt secured by the instrument must be changed from a debt of specialty or simple contract to a debt of record—a judgment. The judgment must discharge the contract sued on, so that it is no longer in force, and no action could be maintained on it.

But such was not the effect of awarding the writ of mandamus commanding these officers to levy a tax. The coupons would still be in full force after the writ was awarded and the tax levied, and an action of debt could be maintained on them against the County at any time before they were paid off.

The exception as to assigned instrument contained in the 11th Section of the judiciary act is strictly construed, because not in harmony with the Constitution. That instrument declares that the judicial power of the United States shall extend to *all* cases between citizens of different States.

Constitution, Art. III, Sec. 2.

The judiciary act says it shall *not* extend to all such controversies, but excepts the case of an assignee whose assignor could not sue. The constitutionality of this exception was discussed by Judge Story in *Bean v. Smith*, 2

Mason, 252, and he held that the exception should be strictly construed. And it was so held by this Court in *Deshler v. Doge.* It was there held that the judgment itself must discharge the chose in action in order to bring the case within the exception.

Bean v. Smith, 2 Mason 252.
Deshler v. Doge, 16 Howard 622.

2. That this is not an action to recover the contents of these coupons is evident from the fact *that the action is not against a party owing the contents.* The obligor is the *County of Bath.*

Now no relief is sought here against the county. We seek to compel certain officers (who do not owe this debt) to perform a duty imposed on them by law, to-wit, to levy a tax.

3. To bring the case within the exception in the eleventh section of the judiciary act, the action must not only be on a chose in action but the chose must be *assignable*, and the action must be brought *in virtue of assignment.*

Bullard v. Bell, 1 Mason 251.

No assignment is necessary in order to pass the title to these coupons, and none has in fact been made. Coupons are a species of commercial paper now well known among commercial men to pass by delivery like coin, and to authorize the holder to demand the contents. The object in making them was that the holder might cut them off and dispose of them. Possession of them is evidence of title, just as it is of a bank bill or of a bill of exchange indorsed in blank.

It makes no difference whether the bond from which the

coupon was cut was payable to order or to bearer. The coupon *itself* is an independent instrument, made in a form intended to pass by delivery, and which does by the usages of bankers pass in that way, irrespective of the form of the bond.

These warrants upon their face are payable to bearer. The language on their face was put there to mean something, and it can mean nothing else. What is it? "*Interest Warrant*, No. 10, payable at the Bank of America, New York, on the 1st day of January, 1860." It is a *warrant*. To warrant, means to authorize, to justify, to give authority. One definition of a warrant is "*An act or instrument authorizing a person to receive a sum of money.*"—*Webster's Dictionary*, 1249.

The word warrant imports negotiability. The bearer of the coupon is warranted in receiving the money—that is, he is thereby legally authorized to receive it. The banker is authorized to pay it to whoever presents it, and its possession furnishes him an indisputable voucher. When the holder presents the warrant, his possession is conclusive evidence of title in him. Any other rule would be attended with intolerable inconvenience.

If the banker was compelled to inquire into the validity of the holder's title, or could only pay when the bond was presented with the coupon, the whole object in making coupons would be defeated, and this species of securities rendered valueless.

It is not necessary to use the word "*order*" or "*bearer*" to make an instrument negotiable. Had these warrants said, "The holder of this coupon will be entitled to receive

the contents," or, "any person presenting this coupon will be entitled to payment thereof," they would have passed by delivery, as much as if payable to bearer. But is not this precisely the import of the language used? It is a *warrant.* It *warrants, justifies, or authorizes* the holder to demand and the banker to pay.

That coupons of the character of those annexed to these bonds are negotiable, and that an action can be sustained on them without producing the bond is not, we submit, an open question in the Federal Court.

In *Knox Co. v. Aspinwall* (21 How. 540), the action was brought upon *284 coupons*—not upon bonds. It was objected that the action could not be maintained, but this Court held that it could.

In *Wood v. Lawrence* (1 Back 404), the action was also upon *coupons*—not upon bonds. The coupons were substantially the same in form as in this case.

In *Amy v. Alleghany City* (24 How. 364), the action was also upon coupons, substantially the same in form as those under consideration. The bonds from which they were taken were payable to order, as in the present case.

We submit that the jurisdiction can be sustained on either of the following grounds:

First. That this is not an action to recover the contents of an instrument, within the meaning of the Statute.

Second. If it is such an action, still we are not claiming by virtue of an assignment—the coupon being a negotiable instrument, passing by delivery, upon which an action can be maintained by the holder.